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IN THE

Supreme Court of the United States

October Term 1982

FRANK MASCALI CONSTRUCTION G.C.P. CO. and
FRANK MASCALI CONSTRUCTION CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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Counsel for Petitioner

(13015)

PARTIES IN THE COURT OF APPEALS

1. Frank Mascali Construction G.C.P. Co.*
2. Frank Mascali Construction Co., Inc.*
3. National Labor Relations Board
4. John Kuebler
5. Charles Curd
6. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

*Frank Mascali Construction Co., Inc. is the managing partner of, and owns a one-third interest in Frank Mascali Construction G.C.P.Co., a joint venture.

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ARGUMENT

In its Memorandum In Opposition, the Board incorrectly states (Point 4, p. 4, 5) that this case does not raise the question of whether National Labor Relations Act sections 8(a)(1) and (3) render an employer liable for union discrimination against an employee where the employer did not know of, and could not have learned of the union's discrimination.

In support of its contention, the Board relies on the language of the Second Circuit Court of Appeals which it quotes (p. 4). The Board says (p.4, 5) that this Court should not consider Petitioners' question because:

> "the Board, upheld by the court of appeals, alternatively held that petitioners should have known, or made inquiries, about the Union's discriminatory administration of the referral system."

By the word "alternatively", the Board admits that the Court of Appeals imposed liability although Petitioners lacked knowledge.

As is evident from the language quoted by the Board at page 4, the Court of Appeals found that, based on Mascali conversations with Kuebler (the discriminatee) and Worhacz (union shop steward for another employer), Mascali:

> "should have known, or made inquiries about, the Union's discriminatory manipulation of the referral system, at least by September 2, 1977."

Those conversations took place on September 2 and 7, (126a, 127a). The Board agreed with the ALJ that prior to September 2, Mascali had no actual knowledge of and no reason to inquire about the Union's discrimination (221a, 222a).

The Board also found that

Mascali's "failure to employ Kuebler after September 2 was unrelated to union considerations and therefore not discriminatory" (220a); and that,

> "even if Respondent Employers had investigated ... they would not have discovered the discriminatory practices ..." (223a, 224a).

Had the Court of Appeals held Mascali liable because it knew of or had reason to investigate the Union's acts on September 2nd, that court would have modified the Board's order to reduce Mascali's liability to the period beginning September 2nd (224a).

However, the Court also upheld Petitioners' backpay liability from July 25 to September 1, 1977--the period when the ALJ, Board and Court of Appeals agree Petitioners had no knowledge.

Clearly, the Board and Court of Appeals have ruled that Mascali vio-

lated sections 8(a)(1) and (3) although Mascali had no knowledge of the Union's discriminatory practices. The Board and Court of Appeals expressly so held.

Therefore, the question framed by Petitioners is appropriately raised for review by this Court.

Respectfully submitted,

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